

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

DE'MARIAN CLEMONS,

Petitioner,

vs.

BRIAN E. WILLIAMS, SR., *et al.*,

Respondents.

2:11-cv-01442-PMP-GWF

**ORDER**

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, by De'Marian Clemons, a Nevada prisoner. On December 26, 2012, the court granted respondents' motion to dismiss in part, concluding that several grounds are unexhausted (ECF #28). On January 14, 2013, petitioner filed a motion to stay and abey proceedings under *Rhines v. Weber* (ECF #29), and respondents filed an opposition (ECF #30).

In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations upon the discretion of the court to facilitate habeas petitioners' return to state court to exhaust claims. The *Rhines* Court stated:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to

1 the state courts, stay and abeyance is only appropriate when the district court  
 2 determines there was good cause for the petitioner's failure to exhaust his claims  
 3 first in state court. Moreover, even if a petitioner had good cause for that failure,  
 4 the district court would abuse its discretion if it were to grant him a stay when his  
 5 unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An  
 application for a writ of habeas corpus may be denied on the merits,  
 notwithstanding the failure of the applicant to exhaust the remedies available in the  
 courts of the State").

6 *Rhines*, 544 U.S. at 277. The Court went on to state that, "[I]t likely would be an abuse of  
 7 discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had  
 8 good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there  
 9 is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 278.

10 The Ninth Circuit has held that the application of an "extraordinary circumstances"  
 11 standard does not comport with the "good cause" standard prescribed by *Rhines*. *Jackson v. Roe*, 425  
 12 F.3d 654, 661-62 (9<sup>th</sup> Cir. 2005). The court has declined to prescribe the strictest possible standard for  
 13 issuance of a stay. "[I]t would appear that good cause under *Rhines*, at least in this Circuit, should not  
 14 be so strict a standard as to require a showing of some extreme and unusual event beyond the control  
 15 of the defendant." *Riner v. Crawford*, 415 F. Supp.2d 1207, 1210 (D. Nev. 2006). Thus, a petitioner's  
 16 confusion over whether or not his petition would be timely filed constitutes good cause for the  
 17 petitioner to file his unexhausted petition in federal court. *See Riner v. Crawford*, 412 F. Supp.2d at  
 18 1210 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 416-17 (2005)). However, the Ninth Circuit has also  
 19 held that a petitioner's "impression" that his counsel had exhausted an unexhausted claim did not  
 20 constitute "good cause" for failure to exhaust that claim. *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9<sup>th</sup>  
 21 Cir. 2008).

22 Here, in petitioner's motion for stay and abeyance, he merely states that he moves for  
 23 a stay in order that he may return to state court to exhaust his unexhausted claims (ECF #29 at 2).  
 24 However, the unexhausted grounds are not "plainly meritless" under the second prong of the *Rhines*  
 25 test, and there is no indication that petitioner engaged in dilatory litigation tactics. Accordingly, this  
 26 court concludes that the balance of the *Rhines* factors narrowly tips in favor of a stay. He shall be  
 granted a stay and abeyance under *Rhines*.

1                   **IT IS THEREFORE ORDERED** that petitioner's motion to stay and abey  
2 proceedings (ECF #29) is **GRANTED**.

3                   **IT IS FURTHER ORDERED** that this action is **STAYED** pending exhaustion of the  
4 unexhausted claims. Petitioner may move to reopen the matter following exhaustion of the claims.

5                   **IT IS FURTHER ORDERED** that the grant of a stay is conditioned upon petitioner  
6 filing a state post-conviction petition or other appropriate proceeding in state court within **forty-five**  
7 (**45**) **days** from the entry of this order and returning to federal court with a motion to reopen within  
8 **forty-five (45) days** of issuance of the remittitur by the Supreme Court of Nevada at the conclusion of  
9 the state court proceedings.

10                  **IT IS FURTHER ORDERED** that the Clerk shall **ADMINISTRATIVELY CLOSE**  
11 **this action, until such time as the court grants a motion to reopen the matter.**

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13                  DATED this 20th day of February, 2013.

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UNITED STATES DISTRICT JUDGE

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